TEOH HENG SENG & ORS

v.

TEOH KIEW SENG & ANOR

HIGH COURT MALAYA, PULAU PINANG
ABDUL HAMID MOHAMAD J
[SUIT NO: 22-157-94]
21 DECEMBER 1999

LAND LAW: *Indefeasibility of title and interests - Conclusiveness of register - National Land Code 1965, s. 340(1) - Whether land transferred to defendants as trustees for plaintiffs - Whether a declaration of trust must be in writing*

About 20 years ago, the litigants' father transferred the disputed land to the defendants. The plaintiffs never raised the issue that the land was transferred to the defendants as trustees for the plaintiffs until the defendants refused to share the compensation paid by the government upon the acquisition of the land. The defendants denied that they were trustees for the plaintiffs and claimed they had purchased the land from their father for RM3,000. There was no written declaration of trust adduced to support the plaintiffs' claim.

Held:

[1] The defendants' title to the land was indefeasible as there was no allegation whatsoever that the defendants had obtained the registration of the land by fraud, misrepresentation or any unlawful act.

[2] The onus was on the plaintiffs to show that the land was transferred to the defendants without valuable consideration to be held in trust for the plaintiffs. The plaintiffs had failed to discharge that burden.

[Plaintiffs' claim dismissed.]

Case(s) referred to:
Grant v. Grant 55 ER 776 ***(refd)***
Lee Phek Choo v. Ang Guan Yau & Anor [1975] 2 MLJ 146 ***(refd)***
Ng Tien & Anor v. Chow Nim Yan [1990] 2 CLJ 937 ***(refd)***
Wan Naimah v. Wan Mohamad Nawawi [1974] 1 MLJ 41 ***(refd)***
Yew Phaik Hoon v. Quah Ooi Keat & Anor [1969] 1 MLJ 32 ***(refd)***

Legislation referred to:
National Land Code 1965, s. 340(1)

For the plaintiffs - Gerald Peter Samuel; M/s Presgrave & Matthews
For the defendants - JA Yeoh; M/s Shearn Delamore & Co

Reported by Izzaty Izzuddin

JUDGMENT

Abdul Hamid Mohamad J:

The five plaintiffs and two defendants are brothers. They come from a family of 14 children, the seven of them and seven sisters. The land which is now in dispute (Holding No. 1359, Mukim 15 Daerah Seberang Perai Selatan) was registered in the name of their father and uncle. So were two other pieces. In May 1972 the uncle met with an accident. Fearing that the uncle might pass away the father and uncle decided to transfer the disputed land to the two defendants. The other two pieces were transferred to the children of the uncle. The land in question remained registered in the two defendants' names. The father passed away in 1980. In 1992, ie, 20 years after the transfer, the government acquired part of the land. With it came compensation. The plaintiffs wanted a part of it. The defendant refused to give. Hence this suit. The plaintiffs say that the land was transferred to the defendants as trustees to hold for all the seven brothers (the seven sisters were not to get anything). The defendants deny that they are trustees. They claim that they bought the land from the father for RM3,000.

The onus is on the plaintiffs to prove on the balance of probabilities that the land was transferred to the defendants as trustees for all the seven brothers.

Both sides called witnesses, mainly members of the family to give oral evidence. But I find their evidence not very reliable. The witnesses are very partisan, and they do not appear to me to have any qualms about saying or denying anything that suits them. The guiding principle is not "truth" but "benefit".

However, I do not reject all the oral evidence. Where the witnesses do not dispute a fact like those I have narrated earlier, of course I accept their evidence. The solicitor's (DW3) evidence deserves to be given more weight.

What evidence do the plaintiffs produce to prove their contention that the land was registered in the name of the two defendants as trustees for all the seven brothers?

First, the oral evidence of the first plaintiff (PW1), the oral evidence of one of the sisters (PW2), the oral evidence of the second plaintiff (PW3). The effect of their evidence is the same: their father told them so. Secondly, letters written by the father to the first plaintiff were produced. The letter, dated 28 June 1972, *inter alia*, says:

> This times (?), transfer land to Keow & Tong, it was my idea. Later when debts are settled, the land will be divided into seven shares equally among the seven brothers.

The letter dated 13 August 1975, *inter alia*, reads:

> No matter how, this land will be owned and shared by seven of you.

The letter dated 7 November 1977, *inter alia*, says:

> I want to transfer all my property and debts to my seven sons. Share equally to avoid my sons quarrelling among themselves after my death. But I haven't got your mother's consent ...
>
> Luckily 5 years ago, I have transferred the four acres of land to Keow Seng & Tong Seng as trustees. So, that, in future you all can sell it or share it equally ...

What evidence do we have to the contrary? First, the grant clearly shows that the defendants are the registered owners. There is no memorandum that they hold the land on trust for anybody. Form 14A dated 2 May 1972 attested by an advocate and solicitor who gave evidence as DW3, says that the consideration for the transfer was RM3,000. Form 16A (charge) dated 10 May 1972, states that the land was charged by the defendants as security for a loan of RM2,000.

On the question of trust, DW3, the solicitor who prepared and attested Form 14A said:

> If vendor had conveyed the property in trust I would have said it in the document and I would prepare a trust deed which would be sent for registration together with Form 14A. If any of them had instructed that the transfer was in trust I would have prepared it that way.

Under cross-examination, DW3 said:

> I would not have known what their intention except what they told me.

Regarding the consideration of RM3,000, DW3 said:

> ... I can't say whether it was paid in my presence or the vendors acknowledge receipt of the money. My practice if the money is not paid in my presence I would ask the vendor whether he had received the money. I was acting for both vendor and the purchasers.

DW4, a brother-in-law of the first defendant gave evidence that he gave a loan of RM2,000 to the first defendant "for the purpose of transferring the land." It must be to discharge the charge.

Learned counsel for the plaintiff submitted that, in law, a declaration of trust may be made orally. He referred to the cases of *Wan Naimah v. Wan Mohamad Nawawi* [1974] 1 MLJ 41 (FC), *Yew Phaik Hoon v. Quah Ooi Keat & Anor* [1969] 1 MLJ 32 (PC) and *Lee Phek Choo v. Ang Guan Yau & Anor* [1975] 2 MLJ 146 (FC).

In *Wan Naimah* the Federal Court, agreeing with the learned trial judge held that half share in the land was held by the appellant, the registered proprietor, in trust for the respondent.

Suffian CJ (as he then was), delivery judgment of the court said regarding the declaration of trust:

> The law is that a declaration of trust may be made quite informally, provided that the words used are clear and unequivocal. As was stated by Romilly M.R. in *Grant v. Grant*, words declaring a trust "need not be in writing ... They must be clear, unequivocal and irrevocable, but it is not necessary to use any technical words, it is not necessary to say, I hold the property in trust for you, nor is it necessary to say, I hold the same for your separate use. Any words that the donor means, at the time he speaks, to divest himself of all beneficial interest in the property are, in my opinion, sufficient for the purpose of creating the trust. I think that it is also sufficient for the purpose of shewing that the trust has been created, if he afterwards states that he has so created the trust, though there was no witness except the donee present at the time the trust was created.
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> The Master of the Rolls was speaking of a declaration of trust in respect of chattels, which may be created by parole, but as a trust in respect of land may be created in Kelantan also by parole (the English Statute of Frauds does not apply), we are of the opinion that the principle above stated is applicable to this case.

Yew Phaik Hoon's case turns on the findings of facts of the trial judge which the Privy Council was of the view should not have been reversed by the Federal Court. The net result is that there was a trust even though it was not made in writing.

Lee Phek Choo is a Federal Court case, from Sarawak. The Federal Court held that as the Statute of Frauds applied to Sarawak, and as there was no writing manifest the declaration of trust, it could not be that a trust was created in respect of the properties. *Wan Naimah* was referred to.

Wan Naimah was again followed by the Supreme Court in *Ng Tien & Anor v. Chow Nim Yan* [1990] 2 CLJ 937; [1990] 3 MLJ 373. Jemuri Serjan SCJ (as he then was) said:

> ... likewise in the instant case quite clearly a trust has been established as evidenced by the various documents exhibits produced in the court below and not by a trust deed that the learned judge looked for in the High Court.

It is clear, especially from the decisions of the Federal Court in *Wan Naimah* and *Lee Phek Choo* that whether a declaration of trust need be in writing or not depends on whether the English Statute of Frauds applies to a particular State of Malaysia, at a particular time. In this case, it is not disputed that the Statute of Frauds is not applicable. So, following the above-mentioned authorities which are binding on this court, there is no necessity for a declaration of trust to be made in writing, to be valid. So, the question before the court is simply whether the plaintiffs have proved that there is such a declaration of trust.

However, I hope I will be excused for highlighting some points regarding the issue.

With greatest of respects, the Federal Court, in arriving at the decisions that it did considered the English Statute of Frauds, not the Malaysian National Land Code or the Torrens System, that is practised here.

England does not adopt the Torrens System. But it has the Statute of Frauds. So, to create a trust in land it must be in writing. In Malaysia, we have the Torrens System. But there is no Statute of Frauds, may be because it was thought to be unnecessary because we already have the Torrens Systems: every transaction, every registrable encumbrance will appear on the register, anyway. Suffian CJ (as he then was) applied the principle of common law of England applicable to chattels in England, (not governed by the Statute of Frauds) to land in Malaysia (governed by the Torrens System). As there is no equivalent of the Statute of Frauds in Malaysia, a trust in land was held to be capable of being created without any instrument in writing. The result is that in England, which does not follow the Torrens System, there must be evidence in writing to prove a trust in land. But, in Malaysia, where the Torrens System was introduced to ensure that every recognised transaction is recorded in the register, an oral declaration of trust is sufficient. As a result, by looking at the register, one cannot know the true and up-to-date position of a particular land. Searches are not safe as it may not contain records of all the transactions or encumbrances on the land.

As pointed out by Suffian CJ (as he then was), the principle laid down by Romilly M.R. in *Grant v. Grant* 55 ER 776 was in respect of chattels. Statute of Frauds does not apply to chattels, even in England. There is no system of registration of chattels as in the case of land in England or here. So, not requiring a trust of chattels to be made in writing, does make sense. But to apply that principle to land in Malaysia, which is governed by Torrens System is arguable.

The principal law concerning land in this country is the National Land Code. To it we should return. Section 340 provides:

> 340(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
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> (2) The title or interest of any such person or body shall not be indefeasible:
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> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
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> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
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> (c) where the title or interest was unlawfully acquired by the person conferred by any written law.

There is no allegation whatsoever that the defendants obtained registration of the land in their names under (a), (b) or (c) above. Their title is therefore indefeasible. That should be a complete answer to the plaintiffs claim.

On the facts, the father and uncle had chosen to transfer the land to the defendants as vendors to purchasers. They had chosen to state the money consideration. They had chosen not to say that it was to be a trust. They had chosen not to tell their solicitor that it was a trust, if it was a trust. Otherwise the solicitor would have prepared a trust deed and filed it together with the transfer form. During the eight years that he was alive after the transfer, the father and the other children did nothing to have the land transferred to the seven of them. Yet, the father appears to be writing to the first plaintiff, earlier on talking about his wish to have all his property divided equally between his sons and later talking about trust. The first point that must be said is that he must be taken to intend what he did, and be bound by his actions. He had, in accordance with law made an absolute transfer to the defendants. He should not be heard to say that he meant something else. Nor should anybody be heard to say the same.

After the father's death, nothing was done by the plaintiffs. But only when the land was acquired by the government, and compensation was paid, that they started making their claims. In the meantime other pieces of land belonging to the father were transferred to the other brothers, with the consent of the defendants who renounced their shares in favour of the others.

As I have said, it is not necessary for the defendants to prove that they bought the land. The onus is on the plaintiffs to show that the land was transferred to the defendants without valuable consideration to hold in trust for the seven brothers. The plaintiffs tried to prove that by saying that the defendants were without money, working for the father, getting paid by the father. Yet the letters produced by the father purportedly written by the father to the first plaintiff always talked about him having no money, about the children not giving him money. In favour of the defendants, are the documents which clearly show that the land was transferred for a consideration of RM3,000, that the earlier charge was discharged, that the defendants took a loan of RM2,000 from the same chettiar.

DW4, a brother-in-law of the first defendant gave evidence that be lent the first defendant RM2,000 to purchase the said land, meaning, I believe, to repay the chettiar from whom RM2,000 was borrowed by the defendants to discharge the earlier charge by the father.

The only evidence of some substance in favour of the plaintiffs is the letters purportedly written by the father to the first plaintiff. I am of the view that the intention that may be gathered from the letters cannot and does not outweigh the statutory documents made by him.

Considering the whole of the evidence it is my finding that the plaintiffs have failed to prove that that the defendants are holding the land as trustees for all the seven of them. I dismissed the action with costs.